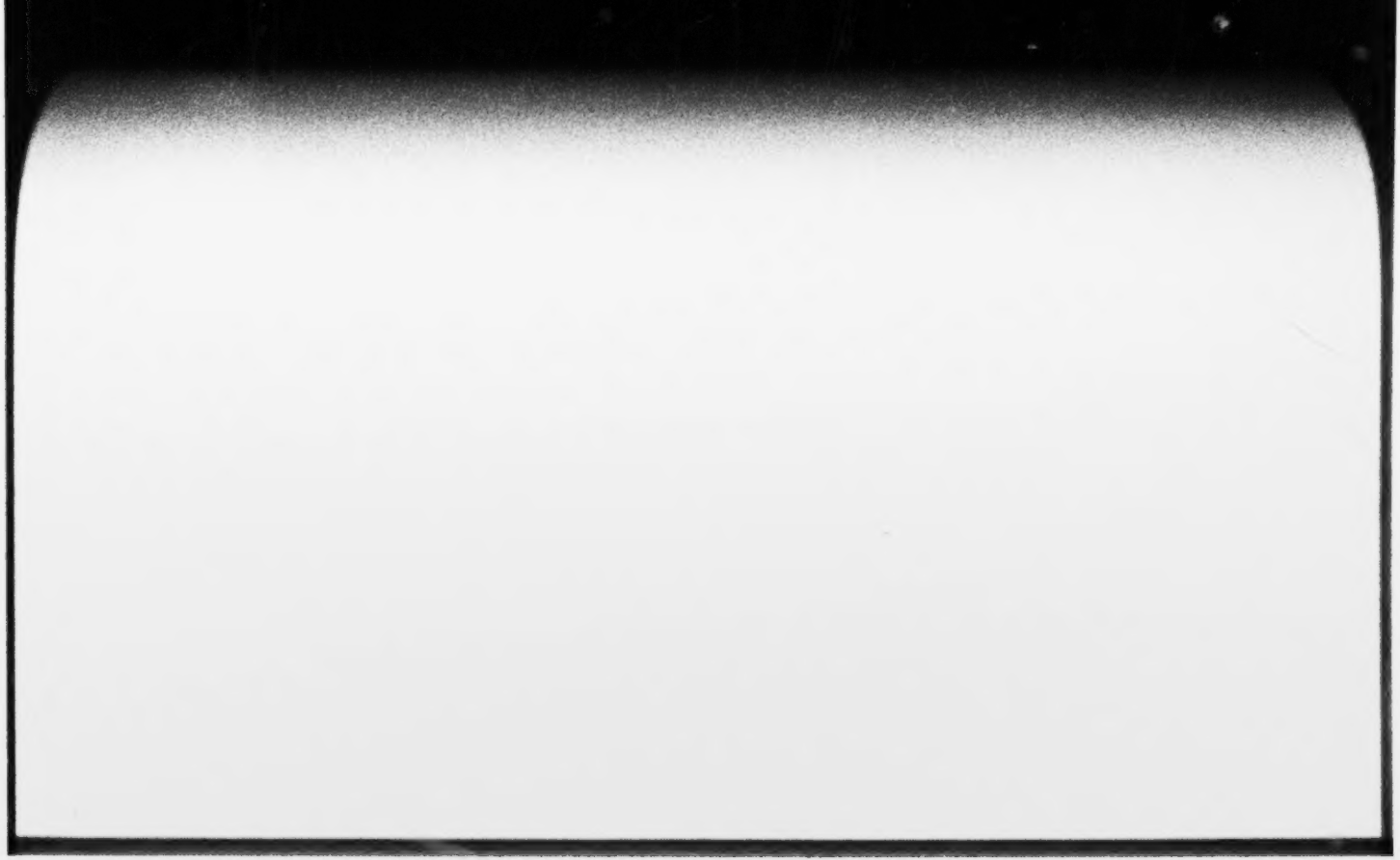

INDEX

OPINION BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

ARGUMENT:
THE CONSTITUTION DOES NOT REQUIRE A PRELIMINARY HEARING IN A STATE COURT 6

CONCLUSION 9

TABLE OF AUTHORITIES

ALBERTSON v. MILLAND, 345 U.S., 242, 97 L. Ed. 983 (1953) 8

BARBARA v. ARKANSAS, 429 F. 2d 20 (8th Cir. 1970) 6

BARBER v. U.S., 142 F. 2d 805, cert. denied, 322 U.S. 741 (1944) 6

BECK v. WASHINGTON, 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962) 7

BOHUS v. BOARD OF EDUCATION, 447 F. 2d 821 (7th Cir. 1971) 7

BRISCOE v. KUSPER, 435 F. 2d 1046 (7th Cir. 1970) 6

COLEMAN v. ALABAMA, 399 U.S. 1 (1970) 6

DELIA v. COURT OF COMMON PLEAS, 418 F. 2d 205 (6th Cir. 1969) 7

DUNOVAN v. PEYTON, 292 F. Supp. 193 D.C. Va. 1968) 9

GRAVES v. EYMAN, 373 F. 2d 324 (9th Cir. 1967) 9

HUDDLESTON v. DWYER, 322 U.S. 232, 88 L. Ed. 1246 (1944) 8

MILWAUKEE ELECTRIC RAILWAY v. WISCONSIN, 252 U.S. 100, 40 S. Ct. 302, 64 L. Ed. 476 (1920) 7

MOREY v. DOWD, 354 U.S. 457, 1 L. Ed. 2d 1485 (1957) 9

MOSS v. HORNIG, 314 F. 2d 89 (2nd Cir. 1963) 7,9

OVERSTREET v. U. S., 367 F. 2d 83 (5th Cir. 1966) 9

OYLER v. BOLES, 368 U.S. 448, 7 L. Ed. 2d 446 (1962) 9

PAINTEN v. COMMONWEALTH OF MASS., 252 F. Supp. 851 (D.C. Mass. 1966) 7

PEELE v. JONES, Civil Action No. 4146 (E.D.N.C. 1973, mem. dec., No. 73-1527 4th Cir., December 14, 1973) 1

PHILLIPS v. NORTH CAROLINA, 433 F. 2d 659 (4th Cir. 1970) 6

POWELL v. POWER, 436 F. 2d 84 (2nd Cir. 1970) 6,7

SAMPSELL v. CALIFORNIA, 191 F. 2d 721 (9th Cir. 1951) 7

SMITH v. VILLAGE OF LANSING, 241 F. 2d 856 (7th Cir. 1957) 7

STATE v. FOSTER, 282 N.C. 189, 192 S.E. 2d 320 (1972) 7

STATE v. GASQUE, 271 N.C. 323, 329, 156 S.E. 2d 740 (1967), cert. denied, 390 U.S. 1030 (1968) 6

STATE v. PEELE, 281 N.C. 253, 188 S.E. 2d 326 (1972) 5

U. S. v. CHASE, 372 F. 2d 453 (4th Cir. 1967) 6

U. S. ex rel JACKSON v. BRADY, 133 F. 2d 476 (4th Cir. 1943), cert. denied, 319 U.S. 746, 87 L. Ed. 1702 9

U. S. v. MACKEY, 474 F. 2d 55 (4th Cir. 1973), cert. denied 37 L. Ed. 2d 401 (1973) 6

VANCE v. NORTH CAROLINA, 432 F. 2d 984 (4th Cir. 1970) 6

VIA v. PEYTON, 284 F. Supp. 961 (D.C. Va. 1968) 8

WILLIAMS v. RHODES, 393 U.S. 23, 21 L. Ed. 2d 24 (1968) 9

WOODBERRY v. McKINNON, 447 F. 2d 839 (5th Cir. 1971) 7

WRIGHT v. RHAY, 323 F. 2d 653 (9th Cir. 1963) 8

STATUTES INVOLVED

N.C.G.S. 15-85 ..... 2, 8

N.C.G.S. 15-86 3

N.C.G.S. 15-87 3,8
N.C.G.S. 15-88 3
N.C.G.S. 15-89 4
N.C.G.S. 15-95 4
N.C.G.S. 7A-272 (b) 4

MISCELLANEOUS

28 U.S.C. § 1254 (1) 2
Amendment XIV (U. S. Constitution) 2

In The

Supreme Court of the United States

October Term, 1973

No. 73-1334

HAYWOOD L. PEELE,
Petitioner

v.

ROBERT E. JONES, Superintendent
Polk Youth Center,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF OF RESPONDENT, ROBERT E. JONES, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

In a Memorandum Decision dated December 11, 1973, the United States Court of Appeals for the Fourth Circuit refused to issue a Certificate of Probable Cause to appeal from the Order of the District Court denying habeas corpus relief. PEELE v. JONES, Civil Action No. 4146 (E.D.N.C. 1973), mem. dec., No. 73-1527 (4 Cir., December 14, 1973). A copy of the Memorandum Decision of the United States Court of Appeals for the Fourth Circuit (Pet. Br. pp. 17-18), as well as the Order of the United States District Court for the Eastern District of North Carolina in PEELE v. JONES, Civil No. 4146 — Raleigh (E.D.N.C. 1973) are appended to the petition. (Pet. Br. pp. 19-21).

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

WHETHER IT IS A DENIAL OF THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT FOR A STATE TO DENY A PRELIMINARY HEARING TO A CRIMINAL DEFENDANT BEFORE INDICTMENT, WHEN PRELIMINARY HEARINGS ARE FREQUENTLY ACCORDED CRIMINAL DEFENDANTS IN THAT JURISDICTION.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .

General Statutes of North Carolina:

N.C.G.S. 15-85

Waiver of examination.—If any person arrested desires

to waive examination and give bail, it is the duty of the officer making the arrest to take him before any magistrate of the county in which the offense is charged to have been committed, or before any justice or judge of the General Court of Justice.

N.C.G.S. 15-86

Procedure, when justice has not final jurisdiction.—In all cases where a justice of the peace has not final jurisdiction of the offense he shall desist from any final determination of the action or complaint, and proceed as hereinafter provided.

N.C.G.S. 15-87

Duty of examining magistrate.—The magistrate before whom any such person shall be brought shall proceed, as soon as may be, to examine the complainant and the witnesses, produced in support of the prosecution on oath, in the presence of the prisoner, in regard to the offense charged, and in regard to any other matters connected with such charge which such magistrate may deem pertinent. The defendant shall be allowed a reasonable time before the hearing begins in which to send for and advise with counsel.

N.C.G.S. 15-88

Testimony reduced to writing; right to counsel.—The evidence given by the several witnesses examined shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively. If desired by the person arrested, his counsel shall be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner; and the prisoner or his counsel shall be allowed to cross-examine the complainant and the witnesses for the prosecution.

N.C.G.S. 15-89

Prisoner examined; advised of rights.—The magistrate shall then proceed to examine the prisoner in relation to the offense charged. Such examination shall not be on oath; and before it is commenced, the prisoner shall be informed by the magistrate of the charge made against him, and that he is at liberty to refuse to answer any question that may be put to him, and that his refusal to answer shall not be used to his prejudice in any stage of the proceedings.

N.C.G.S. 15-95

When prisoner held to answer charge.—If it shall appear that an offense has been committed, and that there is probable cause to believe the prisoner to be guilty thereof, if the offense be bailable and the prisoner offers sufficient bail, such bail shall be taken and the prisoner discharged; if no bail be offered, or the offense be not bailable, the prisoner shall be committed to prison.

N.C.G.S. 7A-272 (b)

The district court has jurisdiction to conduct preliminary examinations and to bind the accused over for trial upon waiver of preliminary examination or upon a finding of probable cause, making appropriate orders as to bail or commitment.

STATEMENT OF THE CASE

Petitioner is presently committed under a life sentence to the North Carolina Department of Correction pursuant to a verdict of guilty of first degree murder entered on January 20, 1972, by the Superior Court of Cumberland County, North Carolina.

Peele was arrested on August 31, 1971, by officers of the Fayetteville, North Carolina, Police Department, charged with armed robbery and felony murder committed in the perpetration of the armed robbery. He was indicted by the Cumberland County Grand Jury during the September 20, 1971 Session of Court for first degree murder and armed robbery and was brought to trial in the Superior Court on the two bills of indictment. Peele was convicted and sentenced to life imprisonment for first degree murder. He was convicted and sentenced to an additional term of 25 to 30 years for armed robbery. The conviction of armed robbery was set aside by the Supreme Court of North Carolina when that Court determined the armed robbery was embraced in and a part of the first degree murder. The Court held that since Peele was convicted of the greater offense of murder, he could not be convicted of a lesser offense necessarily involved in and made a part of the greater offense. STATE v. PEELE, 281 N.C. 253, 188 S.E. 2d 326 (1972).

Subsequent to the affirming of the murder conviction by the Supreme Court of North Carolina, STATE v. PEELE, supra, Peele filed an application for post conviction relief in the Cumberland County Superior Court, which application was denied by that Court on September 19, 1972. He then filed a petition for a writ of certiorari to the North Carolina Court of Appeals to review the denial of the post conviction relief, and this petition for writ of certiorari was denied on November 17, 1972. The basis set forth for relief in Petitioner's applications for post-conviction hearing and appeal of the denial thereof are the identical grounds set forth in the petition for writ of certiorari to this Honorable Court.

Peele then applied for a writ of habeas corpus to the District Court of the United States for the Eastern District of North Carolina. The District Court denied Peele's application and he appealed to the United States Court of Appeals for the Fourth Circuit. The judgment of the District Court

became non-appealable by virtue of the decision of the United States Court of Appeals to deny a certificate of probable cause.

ARGUMENT

THE CONSTITUTION DOES NOT REQUIRE A PRELIMINARY HEARING IN A STATE COURT.

It is no denial of the equal protection clause of the Fourteenth Amendment for a state to indict and try a criminal defendant without first providing him with a preliminary hearing. This is especially true in North Carolina since a preliminary hearing is not essential to the finding of an indictment. VANCE v. NORTH CAROLINA, 432 F. 2d 984 (4th Cir. 1970). North Carolina has no statute which requires a preliminary hearing and the State Constitution does not require one. STATE v. GASQUE, 271 N.C. 323, 329, 156 S.E. 2d 740 (1967), cert. denied, 390 U.S. 1030 (1968). Probable cause is established by grand jury indictment. BARBER v. U. S., 142 F. 2d 805, cert. denied, 322 U. S. 741 (1944). When an accused is tried upon an indictment, he is not entitled to a preliminary hearing. BARBARA v. ARKANSAS, 429 F. 2d 20 (8th Cir. 1970). Nor is there a state or federal requirement that a preliminary hearing be provided when the defendant is subsequently tried on a valid indictment. COLEMAN v. ALABAMA, 399 U. S. 1 (1970); PHILLIPS v. NORTH CAROLINA, 433 F. 2d 659 (4th Cir. 1970); STATE v. GASQUE, supra. A preliminary hearing is not required if there is an indictment, since both serve the same function, U.S. v. CHASE, 372 F. 2d 453 (4th Cir. 1967); BARBER v. U.S., supra; U.S. v. MACKEY, 474 F. 2d 55 (4th Cir. 1973), cert. denied, 37 L. Ed. 2d 401 (1973).

However, even assuming a right to a preliminary hearing under the statute in such instances, which is denied, a deprivation of a state right due to error does not violate the Equal Protection Clause, BRISCOE v. KUSPER, 435 F. 2d 1046 (7th Cir. 1970); POWELL v. POWER, 436 F. 2d 84

(2nd Cir. 1970); DELIA v. COURT OF COMMON PLEAS, 418 F. 2d 205 (6th Cir. 1969). There must be a purposeful or intentional deprivation executed by means of invidious classification, MOSS v. HORNIG, 314 F. 2d 89 (2nd Cir. 1963); WOODBERRY v. McKINNON, 447 F. 2d 839 (5th Cir. 1971); BOHUS v. BOARD OF EDUCATION, 447 F. 2d 821 (7th Cir. 1971), in order to violate the Equal Protection Clause. There is absolutely no showing in this regard. Accordingly, no federal right arising under the Equal Protection Clause is presented for review. Furthermore, the ". . . Fourteenth Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decision . . . [and such a] contention is clearly unsound." MILWAUKEE ELECTRIC RAILWAY v. WISCONSIN, 252 U. S. 100, 40 S. Ct. 302, 64 L. Ed. 476 (1920); BECK v. WASHINGTON, 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962). Essentially, such a claim would be only that the law was misapplied and this is not a basis for habeas corpus relief, BECK v. WASHINGTON, supra. Were the law otherwise, every unsuccessful litigant in state court proceedings would be able to demand that federal courts be the arbiter of the correctness of state court decisions and judgments concerning state law, SMITH v. VILLAGE OF LANSING, 241 F. 2d 856 (7th Cir. 1957); SAMPSELL v. CALIFORNIA, 191 F. 2d 721 (9th Cir. 1951); PAINTEN v. COMMONWEALTH OF MASS., 252 F. Supp. 851 (D.C. Mass. 1966); and the writ of habeas corpus would thereupon serve as an additional appeal on state matters, which it does not.

The North Carolina Supreme Court has held many times that a preliminary hearing is not a necessary step in the prosecution of a person accused of crime and an accused person is not entitled to a preliminary hearing as a matter of right STATE v. FOSTER, 282 N.C. 189, 192 S.E. 2d 320 (1972). In that case, Chief Justice Bobbitt, speaking for a unanimous Court at page 196, had the following to say:

"A preliminary hearing may be held unless waived by

defendant. G. S. 15-85 and G. S. 15-87. But none of these statutes prescribe mandatory procedures affecting the validity of a trial. A preliminary hearing is not an essential prerequisite to the finding of an indictment in this jurisdiction. STATE v. HARGETT, 255 N.C. 412, 413, 121 S.E. 2d 589, 590 (1961). 'We have no statute requiring a preliminary hearing nor does the State Constitution require it. It was proper to try the petitioner upon a bill of indictment without a preliminary hearing.' STATE v. HACKNEY, 240 N.C. 230, 237, 81 S.E. 2d 778, 783 (1954). Accord, GASQUE v. STATE, 271 N.C. 323, 329-330, 156 S.E. 2d 740, 744 (1967); STATE v. OVERMAN, 269 N.C. 453, 467, 153 S.E. 2d 44, 56 (1967); VANCE v. NORTH CAROLINA, 432 F. 2d 984 (4th Cir. 1970); CARROLL v. TURNER, 262 F. Supp. 486 (E.D.N.C. 1966).

"If the Grand Jury finds an indictment, there is no need to conduct a preliminary examination. 21 Am. Jur. 2d Criminal Law, § 442 (1965). Accord, JABEN v. UNITED STATES, 381 U.S. 214, 14 L. Ed. 2d 345, 85 S. Ct. 1365 (1965)."

Interpretations of state laws by the highest court of a state should be accepted by a federal court unless they conflict with the United States Constitution. WRIGHT v. RHAY, 323 F. 2d 653 (9th Cir. 1963), and a construction of a state statute by the highest court of a state binds a federal court. HUDDLESTON v. DWYER, 322 U.S. 232, 88 L. Ed. 1246 (1944); ALBERTSON v. MILLAND, 345 U.S. 242, 97 L. Ed. 983 (1953). Therefore, the interpretation of the North Carolina preliminary hearing statutes is binding on federal courts. These statutes have been interpreted by the North Carolina Supreme Court in STATE v. FOSTER, supra.

The Petitioner has not shown any prejudice resulting from his failure to have a preliminary hearing and he bears the

burden of proving such prejudice. U.S. ex rel JACKSON v. BRADY, 133 F. 2d 476 (4th Cir. 1943), cert. denied, 319 U.S. 746, 87 L. Ed. 1702; VIA v. PEYTON, 284 F. Supp. 961 (D.C. Va. 1968). In this case, Petitioner has suffered no prejudice because he received a transcript of the trial of the state's evidence in his confederate's trial. The issues and the witnesses in the two trials were almost identical because each of the defendants was charged with the commission of the same criminal acts. The evidence showed that they were together when the robbery and murder occurred.

The fact that others may have received preliminary hearings, while Peele did not, does not violate the equal protection of the laws. GRAVES v. EYMAN, 373 F. 2d 324 (9th Cir. 1967); DUNOVAN v. PEYTON, 292 F. Supp. 193 (D.C. Va. 1968). Minor differences in the appliction of rules of practice do not raise an equal protection question, WILLIAMS v. RHODES, 393 U.S. 23, 21 L. Ed. 2d 24 (1968), only discriminations which are "invidious" do. MOREY v. DOWD, 354 U.S. 457, 1 L. Ed. 2d 1485 (1957). Essentially, the decision to bypass the preliminary hearing by obtaining an indictment prior to the time of the preliminary hearing is a matter of proscutorial discretion and such action is not reviewable in the context of an allegation that the equal protection of the laws were not afforded, OYLER v. BOLES, 368 U.S. 448, 7 L. Ed. 2d 446 (1962); MOSS v. HORNIG, 314 F. 2d 89 (2nd Cir. 1963); OVERSTREET v. U.S., 367 F. 2d 83 (5th Cir. 1966). Accordingly, Peele's contention, insofar as it is based on the equal protection clauses of the Constitution of the United States and North Carolina, is without merit.

CONCLUSION

From the foregoing arguments and authorities, it conclusively appears that Petitioner has brought no matter to this Court's attention which would justify its further consideration of his case. He has wholly failed to show either a legal

wrong amounting to an infringement of his constitutional rights, or any prejudicial damage to him arising out of same. Accordingly, his application for writ of habeas corpus was properly denied by the district court; his appeal was properly dismissed by the Court of Appeals; and certiorari should not issue from this Honorable Court to further review Petitioner's case.

This 13 day of May, 1974.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief on counsel for the Petitioner, Norman B. Smith, of the firm of Smith, Carrington, Patterson, Follin & Curtis, by placing three (3) copies in the United States Mail at Raleigh, North Carolina, postage prepaid, to 704 Southeastern Building, Greensboro, North Carolina - 27401, on this 13 day of May, 1974.

John R. B. Matthis
Assistant Attorney General